9

CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 216.

IN THE MATTER OF THE PETITION OF
H. H. LOVING, TRUSTEE.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

FILED FEBRUARY 24, 1910.

(22,038.)

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 12, 1911.

United States Circuit Court of Appeals for the Sixth Circuit.

No. 1985.

the Matter of the Petition of H. H. LOVING, Trustee, to Review n Order of the District Court of the United States for the Western)istrict of Kentucky in the case of Starks-Ullman Saddlery Com-any, Bankrupt.

'his is a petition for the revision of an order of the District Court the United States for the Western District of Kentucky, sitting court of bankruptcy, in the matter of the Starks-Ullman Sad-y Company, bankrupt.

'he petition for revision was filed by H. H. Loving, Trustee in kruptcy in said cause, and seeks revision in matter of law of an er of said District Court adjudging that the American-German ional Bank of Paducah, Kentucky had a lien under the statutes Kentucky upon the property and effects of the bankrupt, in the of $10,125.00 and interest, due for the purchase price of goods by it to the bankrupt in September, 1906.

'he Bank, as a preliminary question, contests the jurisdiction of court to revise the order of the District Court under a petition revision.

'he facts appearing from the record are these:

)n December 4, 1908, after the Saddlery Company had been ad-ged a bankrupt, and the cause had been referred to the referee)ankruptcy, the bank filed before the referee its proof of claim, ified by its cashier, in which it alleged that the bankrupt was ebted to it in the sum of $11,125.00, evidenced by two notes, one $2000.00 dated April 20, 1908, and due four months after date, the other for $8000.00 dated July 25, 1908 and due two months after date, each of which provided for a reasonable attorney's fee, and executed by the bankrupt for unmanufactured leather sold to it for use in carrying on its manufacturing iness. After setting forth the nature of this indebtedness, the of of claim concluded as follows: "Deponent says that * * * and under the provision of Sections 2487-2490 of the Kentucky utes, the claimant has a lien upon all the property and effects of bankrupt involved in its business, and upon all the accessories nected therewith used in its business, to secure the payment of its indebtedness; and deponent now asserts its claim and lien upon such property and effects to secure the payment of its said debt, uding interest upon the notes from maturity thereof, and an rney's fee as provided in said notes of 10 per cent for the col-ion thereof by legal process."

Wherefore, the affiant prays that the claimant's debt be allowed lien claim against the assets of this bankrupt estate, and for all er proper and equitable relief."

'he trustee in bankruptcy thereupon filed exceptions to the allow-

ance of this claim in so far as it was made for any sum in excess of $10,000.00 at the time of the adjudication of bankruptcy, for various reasons set out in the exceptions, and also further objected and excepted to the allowance of any part of the said claim as a lien in favor of the bank against the estate of the bankrupt, for various reasons set forth in the exceptions. These exceptions of the trustee concluded as follows:

"Wherefore, he prays that said claim be disallowed as a lien against the property of the aforesaid bankrupt, and that it be allowed as a general claim only for the sum of two thousand ($2,000.00) dollars, with interest from August 20, 1908; and
3 for eight thousand ($8,000.00) dollars, with interest from September 25, 1908."

The trustee's exceptions were heard by the referee on an agreed statement of facts relating to the origin and nature of the claim and it was thereupon ordered by the referee on March 22, 1909, that the exceptions "be, and the same are, hereby overruled; and the claim of the American-German National Bank proved herein for the sum of $10,125.00, with interest thereon at the rate of 6 per cent per annum, from the 4th day of December, 1908, be and the same is, hereby allowed as a lien claim against the estate of the bankrupt."

The trustee in bankruptcy thereupon filed a petition for the review by the District Court of the order of the referee, in which it was recited "that such order was and is erroneous in that it adjudged that said American-German National Bank had any lien by reason of its aforesaid claim upon any of the assets of the aforesaid bankrupt. Wherefore, your petitioner feeling aggrieved because of such order prays that the same may be reviewed," etc. This petition was heard by the District Judge, and without filing any opinion, the following order was entered therein on May 5, 1909, in the District Court:

"The court being now sufficiently advised of the questions arising upon the petition filed April 2, 1909 by H. H. Loving, trustee of the bankrupt, for a review by the court of the order of the referee entered therein on March 22, 1909, overruling said trustee's exceptions to the claim of the American-German National Bank and allowing said claim as one entitled to a priority in the distribution of the bankrupt's estate, is of opinion that the referee's order was correct. It is therefore, ordered, adjudged and decreed by the court that the said petition for review be denied and dismissed, and
4 that the order of the referee be approved and affirmed."

On June 30, 1909, more than ten days after the entry of the order of the District Court, the trustee in bankruptcy filed in this court a petition for the revision of the order of the District Court. This petition recites:

"That said order was erroneous in matter of law in that it adjudged a dismissal of your petitioner's petition, and in that it adjudged that the American-German National Bank of Paducah, had any lien upon any of the property or effects of the aforesaid bankrupt by virtue of the statutes of the state of Kentucky in such cases made and provided, or by virtue of any law or contract.

"Wherefore your petitioner, feeling aggrieved, because of such order, asks that the same may be revised in matter of law by this Honorable Court of Appeals of the United States for the Sixth Circuit, as provided in Section 24*b* of the bankruptcy law of 1898, and the rules and practice in such cases provided."

In the brief filed in this court in behalf of the trustee in support of the petition, no question is made as to the allowance of the claim of the bank as a general claim against the bank, or as to its amount, the sole contention of the trustee on the merits being that the District Court was in error in matter of law in adjudging that under the Kentucky statutes the claim was secured by a lien upon the property and effects of the bankrupt.

However, as a preliminary question, the bank denies the jurisdiction of this court to revise the order of the District Court in matter of law under Section 24*b* of the Bankruptcy Act, and insists that this order can only be reviewed by this court by an appeal under section 24*b* or section 25*a* (3) of the Bankruptcy Act.

5 The court entertaining grave doubt as to whether it has acquired jurisdiction to revise the order of the District Court under the petition for revision filed under section 24*b* of the Bankruptcy Act certifies to the Supreme Court for its instruction this question, whether, assuming the case to be as above stated, this court has jurisdiction to revise the order of the District Court upon the petition for revision under the provisions of Section 24*b* of the Bankruptcy Act?

Dated Feb. 8, 1910.

HENRY F. SEVERENS,
Circuit Judge.
JOHN W. WARRINGTON,
Circuit Judge.
EDWARD T. SANFORD,
District Judge,
Judges of the United States Circuit Court of Appeals Sitting in said Case.

6 United States Circuit Court of Appeals for the Sixth Circuit.

UNITED STATES OF AMERICA,
Sixth Judicial Circuit, ss:

I, Frank O. Loveland, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing certificate and statement of facts in the *In the* Matter of the Petition of H. H. Loving, Trustee, for Review in the case of Starks-Ullman Saddlery Company, Bankrupt, #1985, was duly filed and entered of record in my office by order of said Court, and as directed by said Court, the said certificate is by me forwarded to the Supreme Court of the United States for its action thereon.

In Testimony Whereof, I have hereunto subscribed my name, and

affixed the seal of said Court, at the City of Cincinnati, Ohio, this 10th day of February A. D. 1910.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

FRANK O. LOVELAND,
Clerk of United States Circuit Court of Appeals for the Sixth Circuit.

Endorsed on cover: File No. 22,038. U. S. Circuit Court of Appeals, 6th Circuit. Term No. 216. In the matter of the petition of H. H. Loving, Trustee. (Certificate.) Filed February 24th, 1910. File No. 22,038.

SUPREME COURT OF THE UNITED STATES.

October Term, 1911.

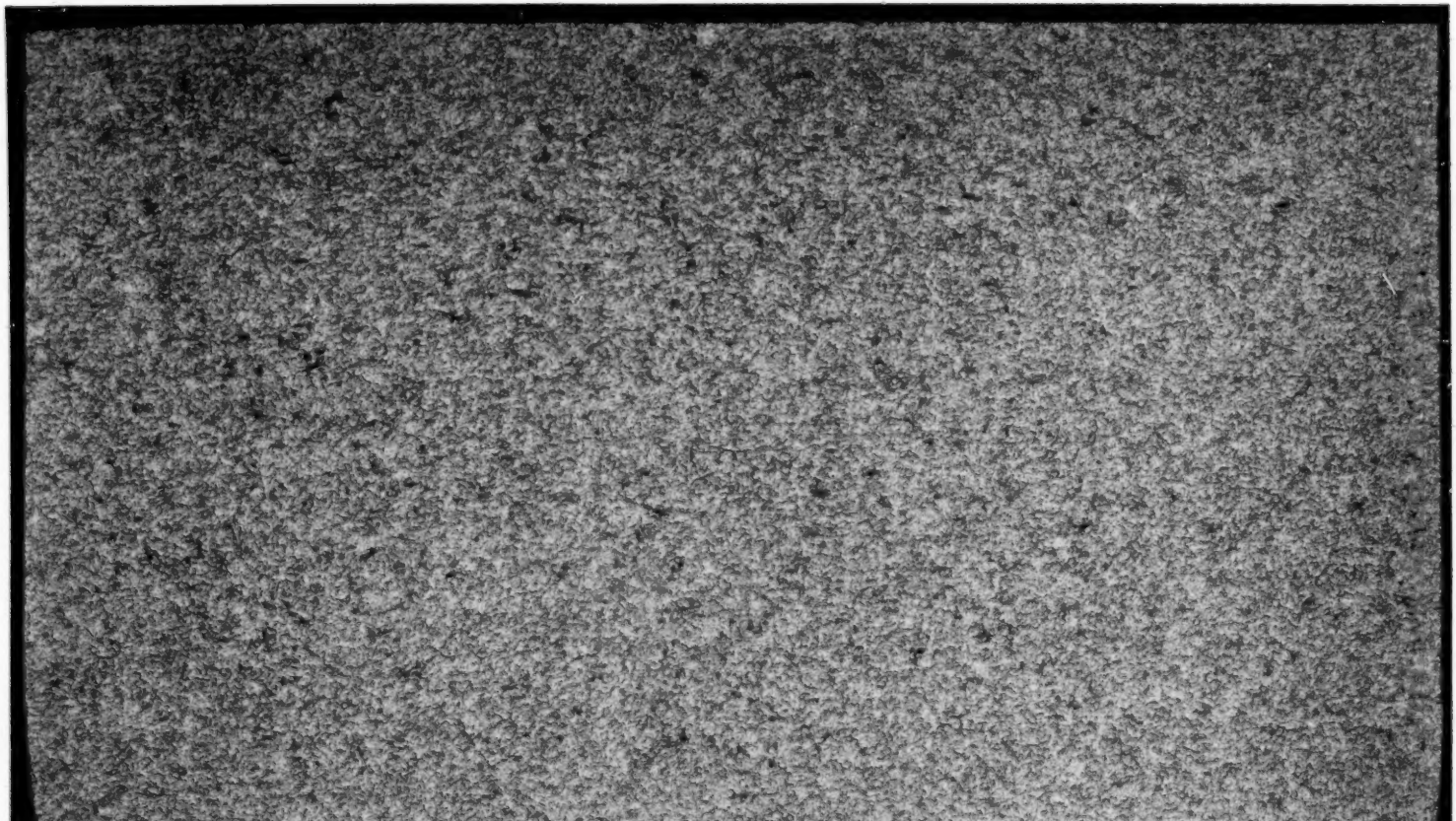
No. 216.

IN THE MATTER OF THE PETITION OF H. H. LOVING, TRUSTEE.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR PETITIONER, H. H. LOVING, TRUSTEE.

JAMES DENIS MCCOUAT,
For Petitioner.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

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IN THE MATTER OF THE PETITION OF
H. H. LOVING, TRUSTEE.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR PETITIONER, H. H. LOVING, TRUSTEE.

Statement of the Case.

The facts of this matter are succinctly stated in the certificate which constitutes the record in this action.

Proof of claim was filed in the bankrupt court by the American German National Bank of Paducah on notes aggregating $10,000.00, and, incidental to the proof, a lien was claimed under materialman's statute of the State of Kentucky. The trustee excepted to the allowance of the

lien. Exceptions were overruled by the bankrupt court. A petition for review was denied by the District Court for the Western District of Kentucky.

Thereupon the trustee filed a petition for a review in the Circuit Court of Appeals for the Sixth Circuit, and that court, being in doubt as to its jurisdiction to review the proceedings under section 24*b* of the Bankrupt Act, has certified the matter to this court.

The only question involved is the jurisdiction of the Circuit Court of Appeals under the petition for review.

ARGUMENT.

It will be seen at the outset that this is not a controversy between the trustee and the creditor as to the correctness or justness of the claim as presented by the bank. The only issue tendered by the trustee is, Did the bank have a lien under the statutes of the State of Kentucky as an incident to the debt which was approved and allowed?

Section 24*b*, as distinguished from 24*a* and section 25, gives to various Circuit Courts of Appeals jurisdiction to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction.

Counsel for claimant proceeds on the theory that this is a controversy arising between the trustee and an adverse claimant upon controverted questions of fact.

This court in the case of Coder *vs.* Arts, 213 U. S., 223, in passing upon the jurisdiction of the various courts, holds as follows:

> "He thus in effect presented to the trustee in bankruptcy a claim upon his notes joined with the statement that he had security upon the estate which it was his purpose to maintain, and upon which he was entitled to priority in the distribution of the assets. He did not, as was the case in Hewit *vs.* Berlin Mach. Works, *supra;* York Mfg. Co. *vs.* Cassell, 201 U. S., 344; Security Warehousing Co. *vs.* Hand, 206 U. S.,

415, intervene in the bankruptcy proceedings for the purpose of asserting an independent and superior title to the property held by the trustees, claiming the right to recover the property and to remove it from the jurisdiction of the bankruptcy court as a part of the estate to be administered. Arts appeared in the bankruptcy court recognizing the title and possession of the trustee in bankruptcy, asserted his claims upon the notes, and his right to have the assets so administered and paid as to recognize the validity of the lien for the security for his claim. We are of the opinion that he thus instituted a proceeding in bankruptcy as distinguished from a controversy arising in the course of bankruptcy proceedings. This being the character of the proceedings, its subsequent disposition and the appropriate appellate jurisdiction are to be determined by the provisions of the bankruptcy act governing bankruptcy proceedings.

"The contest in the Otis case, as in this, was over the claim presented, and, incidentally, to establish a lien upon the bankrupt's estate."

In this case of Coder *vs.* Arts the record shows that the claimant filed proof of claim and sought a lien under a mortgage which was incidental to the claim. In effect, practically the same conditions as we find in the case at bar.

In the case of Tefft Weller & Company *vs.* Munsuri, decided December 4, 1911, Adv. Ops., October Term, 1911, page 67, the case of Coder *vs.* Arts is approved, and the following is the language of the court on the subject of proceedings in bankruptcy:

"Those cases expressly decide that controversies in bankruptcy proceedings, as used in the section, do not include mere steps in proceedings in bankruptcy, but embrace controversies which are not of that inherent character, even although they may arise in the course of proceedings in bankruptcy. The cases referred to, moreover by necessary implication, determine that the mere allowing or disallowing a claim in bankruptcy is a proceeding in bankruptcy, and not a controversy arising in bankruptcy, within the intendment of the section."

If this be a proceeding in bankruptcy, the petition for review confers jurisdiction upon the Circuit Court of Appeals, and conceiving the law to be established in the two cases referred to, we respectfully request that the matter be certified accordingly.

JAMES DENIS MOCQUOT,
For Petitioner.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 216.

IN THE MATTER OF THE PETITION OF
H. H. LOVING, TRUSTEE.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF OF RESPONDENT, AMERICAN-GERMAN NATIONAL BANK.

BRADSHAW & BRADSHAW,
W. F. BRADSHAW, JR.,
Attorneys for Claimant,
American-German National Bank.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1911.

No. 216.

IN THE MATTER OF THE PETITION OF
H. H. LOVING, TRUSTEE.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF OF RESPONDENT, AMERICAN-GERMAN NATIONAL BANK.

Statement of Facts.

The statement in the brief of petitioner does not accurately nor fully state the facts and issues involved.

The certificate from the Court of Appeals presents a very precise statement of the issues involved in this proceeding, and a restatement here is, therefore, unnecessary. The certificate refers to sections 2487 and 2490, both inclusive, of the Kentucky statutes of 1909, but does not set forth the

statutes in full. The issue would have been presented more clearly had these sections of the Kentucky statutes been quoted in full. They are as follows:

> "2487. Lien of employees and material men on property assigned for benefit of creditors. When the property or effects of any (mine) railroad, turnpike, canal or other public improvement company, or of any owner or operator of any rolling mill, foundry or other manufacturing establishment, whether incorporated or not, shall be assigned for the benefit of creditors, shall come into the hands of any executor, administrator, commissioner, receiver of a court, trustee or assignee for the benefit of creditors, or shall in any wise come to be distributed among creditors, whether by operation of law or by the act of such company, owner or operator, the employees of such company, owner or operator of such business, and the persons who shall have furnished materials or supplies for the carrying on of such business shall have a lien upon so much of such property and effects as may have been involved in such business, and all the accessories connected therewith, including the interest of such company, owner or operator in the real estate used in carrying on such business. (The amendment of March 23, 1894, inserted "mine" in first line.)
>
> "2488. Lien superior to other incumbrance—who deemed employees. The said lien shall be superior to the lien of any mortgage or other incumbrance thereafter created, and shall be for the whole amount due such employees, as such, or due for such materials, or supplies; that for wages coming due to employees within six months before the property or effects shall in anywise come to be distributed among creditors, as provided in section 2487, the lien of such employees shall be superior to the lien of any mortgage or other incumbrance theretofore or thereafter created; but no president or other chief officer, nor any director or stockholder of any such company shall be deemed an employee within the meaning of this article. (Section as amended by act of March 21, 1896.)
>
> "2489. Distribution of earnings between lien-hold-

ers when properly operated. When the trustee or other person having the administration or distribution of such property or effects shall continue the operation of the business, it shall be his duty, at the end of each calendar month, after payment of current expenses, and after payment of any debt due the United States or State of Kentucky, to distribute the remaining money in his hands among persons to whom a lien is hereby given *pro rata*, except 20 per cent thereof, which he may, if necessary, reserve for contingent expenses.

"2490. Lien—if business suspended or property levied on. When any such company, owner or operator shall suspend, sell or transfer such business, or when the property or effects engaged in such business shall be taken in attachment or execution, so that the business shall be stopped or suspended, the said lien shall attach as fully as is provided in section first of this article, and in such case may be enforced by proceedings in equity."

ARGUMENT.

The issues presented in this certificate clearly constitute a proceeding in bankruptcy within the rule laid down by Coder *vs.* Arts, 213 United States, 223, and not a controversy arising out of a bankruptcy proceeding.

In the court below, where this jurisdictional issue was raised, the claimant contended that in no event could the action of the district court be reviewed, upon a petition for superintendence and revision under section 24*b* of the bankruptcy act, but that appellate jurisdiction could be had only upon an appeal under either section 24*b*, or section 25*a* (3) of the bankrupt act. Since the decision of this court in Coder *vs.* Arts it is plain that appellate jurisdiction could only have been acquired by the Circuit Court of Appeals by an appeal under section 24*a* (3).

The trustee assumes that this issue involves only a correction of the judgment of the district court in a matter of

law, and that there are no controverted questions of fact raised under the issues made. This assumption is untenable upon the record. The question is a mixed one of law and facts.

As said in Coder *vs.* Arts, at page 236:

> "It is true that Arts asserted both a debt and a lien to secure the same. In such cases the procedure as to the debt or claim governs, with incidental right to consider and determine the validity and priority of the lien asserted upon the property in the hands of the bankrupt's trustee."

And again in the same opinion this court says:

> "The contest in the Otis case, as in this, was over the claim presented, and incidentally, to establish a lien upon the bankrupt's estate.
>
> "It is insisted, however, that inasmuch as the trustee in the case at bar made no objection to the amount found due upon the notes by the district court, and only sought by his appeal to further contest the right to the security asserted by Arts, that his sole remedy was under section 24*b*—to have a revision in the Circuit Court of Appeals by petition filed for that purpose, and that the Circuit Court of Appeals should have dismissed the attempted appeal. But we are of opinion that the character of the proceeding must be determined by the nature of the claim set up against the trustee in bankruptcy, and as section 25*a* (3) gives an appeal to the Court of Appeals from a judgment allowing or rejecting a debt or claim of $500 or over, that the appeal was properly allowed in this case, and brought before the Circuit Court of Appeals the validity of the claim and the lien asserted securing the debt."

In the case at bar the claimant filed its claim, and as an incident thereof and security therefor alleged the existence of a lien under the Kentucky statutes above quoted. The trustee admitted the claim as a debt against the bankrupt's estate, but denied the existence of the lien as an in-

cident thereof, by filing his objections to the allowance of it, and thereafter his exceptions to the action of the referee in allowing the lien. Under the practice in bankruptcy the filing of such objections and exceptions is analogous to a traverse or general denial, not only of the right in law of the claimant to the lien, but of the *existence of the facts upon which the lien arises as a matter of law under the statutes.*

In order to establish the lien it was necessary for the claimant to allege as it did and to prove as it did the following facts:

(1) That the bankrupt was indebted to the claimant.

(2) That the bankrupt was a manufacturing establishment.

(3) That its assets had come to be distributed among creditors.

(4) That the claimant had furnished materials or supplies to the manufacturing establishment.

(5) That such unmanufactured or raw materials were used for the carrying on of such manufacturing business.

The establishment of these facts then gave rise, as a matter of law, under the Kentucky statutes, to the lien. The trustee by his objections and exceptions admitted only the first fact above stated. The others were all put in issue by his objections and exceptions, which served the function of a general denial of the facts therein pleaded in the proof of claim.

The referee allowed both the claim and lien, thereby finding affirmatively upon both the law and the facts in behalf of the claimant. From this action the trustee sought relief by a petition for superintendence and revision only in matters of law. The untenability of the trustee's position can be emphasized more clearly by supposing a reversal of conditions. If the court had allowed the claim, but rejected the lien, the effect of the court's finding would have been, (1) that the prerequisite facts above stated did not exist,

(2) that as a matter of law, therefore, no lien arose under the Kentucky law. Suppose that from this order the claimant had sought a review of the ruling of the court below in the matter of the law only. The appellate court being unable under the petition to review the facts would be bound by the findings of fact of the court below, and assume that it would take jurisdiction on a petition for review it could do nothing but affirm the action of the lower court.

Proceedings in bankruptcy, as defined by this court and the various inferior courts, are of two kinds. One kind of such proceeding being a review by petition for superintendence and revision under section 24*b* of the bankruptcy act. An apt definition of this class of proceeding in bankruptcy is given *In re* Mueller, 135 Federal, page 711. In that opinion, at page 715, the court says:

> "The proceedings reviewable are those administrative orders and decrees in the ordinary course of a bankruptcy between the filing of the petition and the final settlement of the estate, which are not made specially appealable under section 25*a*. This would include questions between the bankrupt and his creditors of an administrative character, and exclude such matters as are appealable under section 24*a*."

The other class of proceeding in bankruptcy reviewable by the Circuit Court of Appeals, as in equity cases, is specifically defined under section 25*a* (1), (2) and (3).

This claim, as in Coder *vs.* Arts, was a claim for a debt filed against the estate of the bankrupt, and as an incident thereof, and as security therefor, there was pleaded a statutory lien against the assets of the bankrupt's estate. Therefore, as in Coder *vs.* Arts:

> "The procedure as to the debt or claim governs with incidental right to consider and determine the validity and priority of the lien asserted upon the property in the hands of the bankrupt's trustee."

The allowance or rejection of the claim could only have been appealed from by either party under section 25*a* (3), and, therefore, the procedure determines the right of review upon appeal of the incident of the claim. This identical question was decided and stated with great clearness in Cunningham *et al. vs.* German Ins. Bank, 103 Federal Reporter, page 932, in an opinion rendered by Justice Lurton, then judge of the sixth circuit. In that opinion, at page 935, the court says:

> "The motion to dismiss the appeal in so far as it includes an appeal from the judgment according to the debt or claim of appellee the benefit of the lien of its mortgage must be also denied. This motion is based upon the suggestion that an appeal will not lie to this court from a judgment denying or allowing a lien or preference out of the bankrupt's estate, but that such a judgment can only be questioned by petition invoking the power conferred upon the court by section 24 of the bankruptcy act of 1898. The appellate jurisdiction of this court in bankruptcy proceedings is defined by section 25, *id.* By that section an appeal, as in equity cases, may be taken in bankruptcy to this court in the following cases, to wit: (1) From a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) from a judgment granting or denying a discharge; (3) and from a judgment allowing or rejecting a debt or claim of $500 or over. Learned counsel say that a review of judgment allowing or disallowing the lien of a debt or claim can only be had under the superintending and reviewing powers of this court granted by section 24, and that an appeal will not lie from such a judgment. If this be true, such a judgment can be reviewed only upon matters of law, and, when the lien allowed or denied depends upon a controverted question of fact and law, no review of the judgment is possible, inasmuch as the remedy afforded by section 24 is limited to matters of law. To this construction of the act we cannot assent. The appeal from a judgment allowing or rejecting a debt or claim includes as an incident any question as to the

rank or lien of such debt or claim in the distribution of the bankrupt's estate. If the debt or claim, including its lien or preference, depend upon controverted questions of fact and law, the right of appeal is granted by section 25, above set out. The motion of appellee must be denied, and the costs of the motion taxed to it."

The order of the district court affirming the action of the referee in the case at bar was entered on May 25, 1909. The petition for a revision upon which this question was brought before the Circuit Court of Appeals was filed on June 30, 1909, more than ten days after the entry of the order of the district court. We respectfully submit that the trustee has pursued the wrong course, and that an appeal from the order of the district court to the Circuit Court of Appeals could lie only by an appeal within ten days from the entry of the order of the district court as provided in section 25*a* (3) of the bankruptcy act.

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American-German National Bank.